United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-2187

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

THERESE ROBERGE,
On behalf of herself,
her minor children and
all persons similarly
situated,
Plaintiff-Appellants

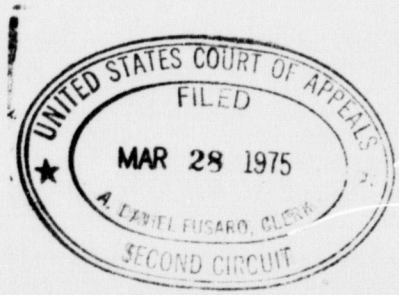
vs.

PAUL PHILBROOK,
Commissioner of
Social Welfare,
Defendant-Appellee

On Appeal from the United States District Court

for the District of Vermont

REPLY BRIEF OF PLAINTIFF-APPELLANTS



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3

TABLE OF CONTENTS

CASES — PAGES

STATUTES

REGULATIONS

A. INTRODUCTION

This reply brief is submitted to correct certain parts of the separate statement of facts contained in the Brief of Appellee, to provide additional argument on one of the two issues presented to this court by Appellant in the light of Appellee's Brief, and to brief the issue presented by Appellee's Cross Appeal.

B. SUPPLEMENTAL STATEMENT OF FACTS

Appellants believe that certain of the facts added by Appellee's statement of facts are inaccurate or incomplete as detailed below:

1. Only the ANFC basic need standard was raised from 89.5% to 100% in November of 1970. Compare Brief of Appellee at 5. The other components of the overall standard were either reduced or eliminated. See Appendix of Exhibits at A-3, A-9; Appendix at A-72.
2. Fire insurance special needs were never eliminated; they were made subject to the pre-existing shelter maxima. See Appendix at A-64. Compare Brief of Appellee at 4-5.
3. In the comparisons of the cost of shelter exceptions, shelter in general and all ANFC payments, the per recipient costs shown on page 7 of Appellee's Brief are yearly costs for overall payments and monthly costs for shelter and shelter exceptions. See Appendix of Exhibits at A-37.
4. The facts stated on page 7 and 8 of Appellee's Brief

relative to savings to the state from changes introduced in November 1, 1970 are disputed. In stating the savings to the state, defendant has totally omitted the savings from the deletion of non-recurring special needs. Judge Coffrin found that to be a "significant omission." Transcript p. 137. Defendant has also ommitted any consideration of the November 1, 1970 policy change making General Assistance unavailable to ANFC recipients although the new General Assistance policy was considered "an essential and integral part of this overall change." See Plaintiff's Exhibit No. 1 in Appendix of Exhibits at A-4; Transcript pp. 133-37.

5. On page 8 of Appellee's Brief, he speaks of an averaging of special needs on November 1, 1970. That averaging actually took place around August, 1971. See Appendix at A-64. Further, the averaging and addition of fire insurance took place after all other special needs were averaged. See Transcript pp. 190-91 .

C. ARGUMENT

I. The Elimination of Shelter Exceptions in the ANFC Program Violated § 402(a)(23) of the Social Security Act.

Two points made in Appellee's Brief on the Elimination of Shelter Exceptions necessitate rebuttal: (1) whether the elimination of shelter exceptions was offset by fair pricing - that is, averaging - into the basic need standard and (2) whether shelter exceptions

were part of the ANFC shelter maxima.

The heart of Appellee's argument on the shelter exception question is contained in his overall characterization of what occurred on November 1, 1970 - the date when shelter exceptions were eliminated:

> . . . Vermont has increased its expenditures in the ANFC program so that the benefit will be more equitably spread, by averaging the shelter exceptions throughout the entire caseload.

Brief of Appellee at 18. This underlying thesis is stated numerous times in Appellee's Brief.[1/] See Brief of Appellee at 20-21, 22, 24, 25. At one point, Appellee enlarges further on the theory by stating that shelter exceptions were part of the "basic need standard". See Brief of Appellee at 20.

Appellee's characterization is wholly at odds with the findings of Judge Oakes and all of the evidence in this case. In his Opinion and Order of October 13, 1972, Judge Oakes found:

1/ Appellee has made only one reference to the record to support his assertion. See Brief of Appellee at 20-1. On that occasion, Appellee quotes Judge Coffrin as finding that shelter exceptions were "averaged throughout the total ANFC population and were totally eliminated as identifiable items in the basic need standard." Appendix at A-65. That reference is wholly misrepresented. The finding referred to dealt with fire insurance, not shelter exceptions. Moreover, the full sentence (which is truncated in Appellee's quotation) stated that unlike the fire insurance component, those items of need that were averaged on November 1, 1970, were totally eliminated as identifiable items in the basic need standard. See Appendix at A-65. Nowhere does Judge Coffrin find that shelter exceptions were averaged across the ANFC caseload and added to the basic need standard. Indeed, Judge Oakes had already made a contrary finding.

> The allowance for housing exceptions was, in effect, a downward adjustment of the overall standard of need. Although the payment for the "basic allowance" component of the overall standard of need was increased from 87 to 100 per cent of the separate standard of need for that component, that increase did not take into account the reduced level of housing benefits.

Appendix at A-56. It is undisputed that the basic need component of the ANFC program - the only component raised on November 1, 1970 - has never included the cost of shelter. See, e.g., Transcript, pp. 48-50 (Testimony of Vasili Bellini, Director of ANFC program); Appendix of Exhibits at A-6 (November 1, 1970 ANFC regulations showing components of basic need standard). It is also undisputed that when special needs were averaged and priced into the basic need standard, shelter exceptions were not averaged. See Transcript p. 179 (Testimony of Bert Smith, Assistant Director of ANFC Program)[2/]

Appellee's assertion of fair averaging of shelter exceptions is actually an argument that decreases in one component of the overall need standard can be offset and validated by increases in a different component. See Defendant's Memorandum of Law 3, 4 (March 15, 1974.) This argument was specifically rejected by Judge Oakes

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2/ Although it is not in issue in this case, Appellants do not believe that averaging of shelter exceptions into the basic need standard would comply with § 402(a)(23) especially under the lower court's test of significance. Rosado does not authorize splitting a need component (here, housing) and averaging part of the component in order to pare benefits while maintaining dollar maxima. Such a splitting of a need component while maintaining a maximum would allow paring of benefits in the context of a maximum system in direct violation of the Congressional purpose.

because it authorized shuffling funds from one group of ANFC recipients to another and obscured the actual impact.[3/]

The clear holding of Rosado v. Wyman, 397 U.S. 397 (1969), is that each specific item of the overall need and payment standards must be dealt with in such a way as to comply with § 402(a)(23) of the Social Security Act. Deficiencies in the treatment of one item may not be justified by favorable treatment of another item whether or not there is an overall decrease in benefit levels. See 397 U.S. at 419. This holding has been reiterated in numerous cases and in numerous contexts. See, e.g., Rosselli v. Affeck, 508 F.2d 1277, 1280 (1st Cir. 1974); Rosado v. Wyman, 437 F.2d 619, 628 (2d Cir. 1970); Alvarado v. Schmidt, 369 F. Supp. 447 (W.D. Wis. 1974). There is no question of its application to this case.

Even if Appellee's theory had merit, the factual basis for it is lacking. Judge Coffrin made no findings to support Appellee's theory and Appellant has consistently disputed Appellee's factual allegations. See Transcript pp. 27-29, 133-37. At best, Appellee's

3/ The basic need standard is the largest of the three components and includes food, clothing, fuel and utilities within it. Because of this and the name of the component, any increase in the component tends to totally obscure any decrease in other components. The public perception of an increase from 89.5% to 100% of basic need is obvious. The aggregate loss from deletion of individual recurring and non-recurring special needs and shelter exceptions, coupled with the loss of the ability to resort to General Assistance and changes in specific components such as fire insurance, is not obvious. This difference in apparent impact has enabled Appellee to boldly claim that ANFC recipients gained in 1970 although the evidence in support of this allegation was plainly incomplete and Appellant has consistently disputed the claim (and its relevance). See Transcript pp. 27-29, 122-25, 133-37.

theory would warrant a new trial where the overall gain or loss to ANFC recipients on November 1, 1970 would be explored.

The second point in need of clarification in response to Appellee's brief is the question of whether shelter exceptions were part of the ANFC shelter maxima. Appellant has argued that shelter exceptions were part of the maximum, generally because the opposite conclusion would lead to unlikely results and would undermine the policy of § 402(a)(23). See Brief of Appellant at 15-20.

Appellee has argued that shelter exceptions were not part of the ANFC shelter maxima and has offered a new characterization of shelter exceptions. He argues they are "part of the basic need standard." Brief of Appellee at 20. There is no evidence that any shelter needs were ever included in the basic need standard, and it is impossible to find any indication that shelter exceptions are part of the basic need standard. See p. 5, supra. Whatever the merits of Appellee's other arguments against considering shelter exceptions as part of the maxima, his alternative discription of shelter maxima is clearly inaccurate. 4/

4/ The other factors bearing on the treatment of shelter exceptions are covered in Appellant's Brief, including the use of exceptions to establish initial and continuing eligibility. Appellant would emphasize, however, her position that the opinions of welfare department administrators - especially in view of the conflicts in these opinions - should be considered only minor factors because these opinions are based on hypothetical events and have no practical significance except to the outcome of this litigation.

II. The Elimination by Defendant of Fire Insurance Allotments for ANFC Recipients whose Shelter Costs were at the Maximum Violated § 402(a)(23) of the Social Security Act, 42 U.S.C. § 602(a)(23), and Regulations Promulgated Thereunder.

Prior to November 1, 1970, recipients of ANFC were entitled to purchase fire insurance and obtain reimbursement from the Department of Social Welfare by an allotment in the monthly grant. See Plaintiff's Exhibit No. 2 (Appendix of Exhibits at A-18). There was no maximum on the payment of fire insurance. On November 1, 1970, defendant brought fire insurance within the rental maxima so that a recipient could be reimbursed for the cost of fire insurance only if the combined cost of fire insurance, water and rent was below the applicable rental maximum. See Plaintiff's Exhibit No. 1 (Appendix of Exhibits at A-7).[5/]

The shift of fire insurance from the status of a special need item to part of the shelter component, subject to the shelter maxima, can be viewed either as a lowering of the shelter maxima or as the imposition of a maximum on fire insurance so as to reduce

5/ Appellee has asserted in his brief that fire insurance "was treated in the same fashion as all other special needs, namely elimination" and much of his argument is based on this proposition. See Brief of Appellee at 29-30. That assertion is at variance with the facts and findings of Judge Coffrin. See Appendix at a-64; Plaintiff's Exhibit No. 1. in Appendix of Exhibits at A-7 (regulations describing treatment of fire insurance after November 1, 1970); Transcript pp. 190-95 (Testimony of Bert Smith). Fire insurance payments were never wholly "eliminated"; they were placed under the shelter maxima.

payments for this item. If viewed as a lowering of the existing shelter maxima, then the clear wording as well as intent of § 402 (a)(23) was violated. If viewed as the imposition of a new maximum on fire insurance, then the clear intent of § 402(a)(23) has been violated because defendant was able to pare down payments for fire insurance with the use of a dollar maximum.[6/] See Alvarado v. Schmidt, 317 F. Supp. 1027 (E.D. Wis. 1970). Viewed from either perspective, the bringing of fire insurance under the shelter maxima violated § 402(a)(23).

While Appellee did not dispute the above analysis in the District Court, he attempted to show that any illegality introduced in November of 1970 was obviated by the placing of averaged fire insurance needs into the basic need standard in August of 1971. In doing this, he did not change the availability of fire insurance to those with shelter costs below the maxima, but, in essence, double - covered fire insurance by costing it, along with other special needs, into the basic need standard. See Appellee at A-64,

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6/ Subjecting fire insurance to the maximum has the subsidary effect of obscuring the need and payment standard since the availability of fire insurance depends on an unrelated variable - the amount a recipient pays for shelter. It could also be looked at as a non-"ratable" reduction although the fact that fire insurance has not been averaged makes the "new maximum" characterization more appropriate. See 45 C.F.R. § 233.20(a)(2)(ii).

65,-70, -71. Although it is clear the defendant could average a special need into the basic standard consistent with § 402(a)(23), See New Jersey WRO v. Cahill, 349 F. Supp. 501 (D.N.J. 1972), the averaging allegedly done in this case did not validate the restrictions on fire insurance payments for two reasons.

The first reason is that the averaging was a simple exercise in bookkeeping, done after the fact, and with no resulting impact on the basic need standard. The defendant had already increased the basic need standard by two dollars per person to account for special needs. Since the averaged cost of fire insurance allotments was $.16 per person, the defendant added it to the two dollars per person and rounded back to two dollars.[7/] In view of this evidence Judge Coffrin found:

7/ The $.16 added for fire insurance could have been significant for larger families. For example, for a family of four, the need standard applicable to special needs should be nine dollars (4x 2.16 rounded) rather than the eight dollars (4x$2) actually used by defendant. The failure of defendant to reflect the impact of added fire insurance costs for larger families is evidence that the attempt to add fire insurance to the basic need standard was made solely to provide a defense to an attack on the treatment of fire insurance in 1970 without any meaningful change in the need or payment standards.

> [T]he fact that the rounding process effectively removed fire insurance from the standard of need under defendant's interpretation of what became of fire insurance prompts us to consider more stringently how fire insurance was in fact treated under the new regulatory scheme.

See Appendix at A-70. 8/

The second reason is that defendant continued to include fire insurance under the shelter maxima after allegedly averaging fire insurance allotments into the basic need standards. As a result, fire insurance appears twice in the ANFC overall need standards although recipients need a fire insurance allotment only once (if at all). It is clear that double coverage of fire insurance was unjustified and an attempt to avoid the mandate of § 402(a)(23).

8/ Defendant offered another explanation for the deletion of the impact of fire insurance in the rounding process, arguing that the rounding from $2.16 to $2.00 affected all special need items equally and did not effectively eliminate the fire insurance item. In view of the evidence that fire insurance was averaged and added to the basic need standard after all other special needs had been averaged and added, Judge Coffrin found:

> In this regard we note that the evidence is inconsistent with any contention that the per item average of the eliminated needs was reduced pro rata to yield the rounded figure of $2.00 per recipient.

See Appendix at A-74, n.7. In reaching such a conclusion, the lower court has considerable discretion and cannot be reversed without a showing that the finding was clearly erroneous. See Rosado v. Wyman, 437 F.2d 619 (2d Cir. 1970); Roselli v. Affleck, 508 F.2d 1277 (1st Cir. 1974). The evidence clearly supports the conclusion. See Transcript pp. 190-95 (Testimony of Bert Smith).

See 45 C.F.R. § 233.20(a)(1) (determination of need must be objective); Maretti v. White, 342 F. Supp. 823 (D. Conn. 1972) (can not make assumptions on need at variance with the facts). In assessing the validity of need and payment standards under § 402(a)(23), the lower court may eliminate duplications in coverage of needs. See Rosado v. Wyman, 322 F. Supp. 1173, 1185-86 (S.D.N.Y.), aff'd, 437 F.2d 619 (2d Cir. 1970) aff'd, 402 U.S. 991 (1971). In this case the lower court eliminated the duplication by finding that it "was improper to place [fire insurance] . . . in the list of needs wholly eliminated for purposes of distributing its price throughout the ANFC caseload" and refused to give any affect to the alleged averaging that took place in 1971.

In refusing to give effect to the defendant's alleged costing of fire insurance into the basic need standard and finding that the placing of fire insurance under the shelter maxima violated § 402(a)(23), the lower court acted within its discretion and should be upheld. See Rosado v. Wyman, 437 F.2d 619 (2d cir. 1970), aff'd 402 U.S. 991 (1971).[9/]

9/ Appellee has asserted before this court that the change in the treatment of fire insurance was de minimis. As argued in her original brief, Appellant urges that any reduction in a maximum or any paring of benefits through a maximum is impermissable whether or not de minimis. See Brief of Appellant at 21-22. Moreover, based on a 10% incidence of fire insurance allotments, the District Court found the elimination of fire insurance as a separate factor to be significant and defendant has not demonstrated that this conclusion is erroneous or that there was any change in the recipients' need for fire insurance on November 1, 1970. See Appendix at A-74, n.6; Rosado v. Wyman, 437 F.2d 619, 630 (2d Cir. 1970).

C. CONCLUSION

For the reasons stated above, Appellants continue to urge this court to reverse the lower court's order of May 9, 1974 granting judgment for Defendant on the shelter exception issue and further urges this court to affirm the lower court's opinion of May 9, 1974 and order of July 19, 1974 on the fire insurance issue.

DATED: March 27, 1975

Respectively submitted,

/s/ John A. Dooley

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REPLY TO: Box 562
Burlington, Vt.

March 27, 1975

A. Daniel Fusaro, Clerk
United States Court of Appeals
United States Court House
Foley Square
New York, New York 00007

Re: Therese Roberge vs. Paul Philbrook

Dear Mr. Fusaro:

Enclosed please find twenty five (25) copies of REPLY BRIEF OF PLAINTIFF-APPELLANTS, for filing with the Court.

Please be advised that copies of same have been forwarded this date to David L. Kalib, Esquire, Attorney for Defendant.

Sincerely,

John A. Dooley, III
Staff Attorney

JAD/dr

Enclosures (25)